

1 KAREN A. OVERSTREET
Chief Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
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6 IN THE BANKRUPTCY COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 In re

Chapter 7

9 BARRY HAMMER and ABLE MORTGAGE
10 & INVESTMENTS, INC.,

Case No. 04-22244

11 Debtors.

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13 PETER ARKISON, solely in his
capacity as Chapter 7 Trustee of
the estate of Barry Hammer and
14 Able Mortgage & Investments,
Inc.,

15 Plaintiffs,

Adversary No. 06-1392

16 vs.

17 RODNEY DUNCAN AND JANE DOE
DUNCAN, husband and wife and the
18 marital community composed
thereof,

19 Defendants.
20

MEMORANDUM DECISION

NOT FOR PUBLICATION

21 The Defendants' Motion for Summary Judgment came on before
22 the Court for argument on April 6, 2007. The Court took oral
23 argument from counsel for the parties. During oral argument it
24 became clear that the parties disagreed as to how to interpret
25 the applicable statute of limitations. Specifically, the
26 Trustee argued that the Washington fraudulent conveyance

Memorandum Decision - 1

1 statute, RCW 19.40.041(a)(1), made applicable under 11 U.S.C.
2 §544(b), allowed the Trustee to recover transfers occurring
3 within the four years prior to the date of the bankruptcy
4 petition. Defendants contend that the Trustee can only recover
5 transfers made during the four years prior to the filing of
6 this adversary proceeding. Because neither party had briefed
7 this issue before the hearing, the Court requested additional
8 briefing and took the matter under advisement. The additional
9 briefing has now been submitted and reviewed.

10 **Factual Background**

11 The material underlying facts are not disputed by the
12 parties. From June 1991 through August 1999, the defendants,
13 Rodney and Jane Doe Duncan, invested the total amount of
14 \$62,784.32 into Able Mortgage & Investments, Inc., with the
15 assistance of Mr. Barry Hammer, the debtor herein. The
16 investment was made through a series of five separate
17 transactions, each documented by a promissory note. From
18 July 22, 1991 through August 23, 2004, the Duncans received
19 over one hundred interest payments totaling \$90,537.32 --
20 \$27,752.32 more than their initial investment. Mr. Hammer
21 filed for relief under Chapter 7 on September 17, 2004. The
22 Trustee filed this complaint on September 17, 2006 seeking to
23 recover the "false profits" received by the defendants as
24 preferential or fraudulent transfers under Bankruptcy Code
25 sections 544, 547 and 548 and Washington's Uniform Fraudulent
26 Transfer Act, RCW 19.40.

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1 108(a) governs and allows him to recover payments made on or
2 before September 17, 2000. However, section 108(a), by its
3 plain language, applies only to extend a statute of limitations
4 on a cause of action that belongs to the debtor. *In re*
5 *Radcliffe's Warehouse Sales, Inc.*, 31 B.R. 827, 832 (Bankr. W.D
6 Wash. 1983)(J. Skidmore). Because the cause of action asserted
7 here under section 544(b) may only be asserted by the trustee,
8 section 108(a) does not apply.

9 Section 546(a) limits the time in which a trustee can
10 assert an avoidance action, including an avoidance action under
11 section 544(b). Although a trustee's claim may arise under a
12 state fraudulent conveyance statute, as in the instant case,
13 the trustee's standing to assert that claim only arises by
14 virtue of section 544(b) on the petition date. When the
15 petition is filed, the trustee is authorized to evaluate
16 potential fraudulent transfers and, within the limits of
17 section 546(a), bring a cause of action for avoidance. *See*
18 *Mahoney, Trocki & Associates, Inc. v. Kunzman*, 111 B.R. 914
19 (Bankr. S.D. Cal., 1990). In other words, the number of
20 transfers that are potentially avoidable does not change
21 depending on when the trustee initiates a recovery action; the
22 potentially avoidable transfers are determined as of the
23 petition date.

24 The interpretation of the statute of limitations in this
25 manner is true to the plain language and interaction of the
26 relevant bankruptcy statutes. It also promotes certainty for

1 all parties when addressing situations involving multiple
2 transfers. Recipients of the transfers know what transfers are
3 at risk as of the filing of the petition. Similarly, the
4 trustee has the benefit of the entire limitations period in
5 which to investigate the transfers at issue.

6 The Trustee herein has the authority under RCW 19.40.41
7 and 544(b) to recover transfers made within four years of the
8 date of the bankruptcy petition, i.e., transfers made on or
9 before September 17, 2000. The defendants are entitled to
10 summary judgment as to transfers that occurred prior to
11 September 17, 2000. If, after reviewing this Memorandum
12 Decision, the parties are unable to resolve by agreement the
13 amount of "false profits" received by the defendants, another
14 summary judgment motion should be filed regarding that issue.

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16 DATED this 18th day of May, 2007.

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18 KAREN A. OVERSTREET
19 United States Bankruptcy Judge
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